LIBRARY
SUPREME COURT, U.S.

Supreme Court, U
FILE
OCT 30 19
MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

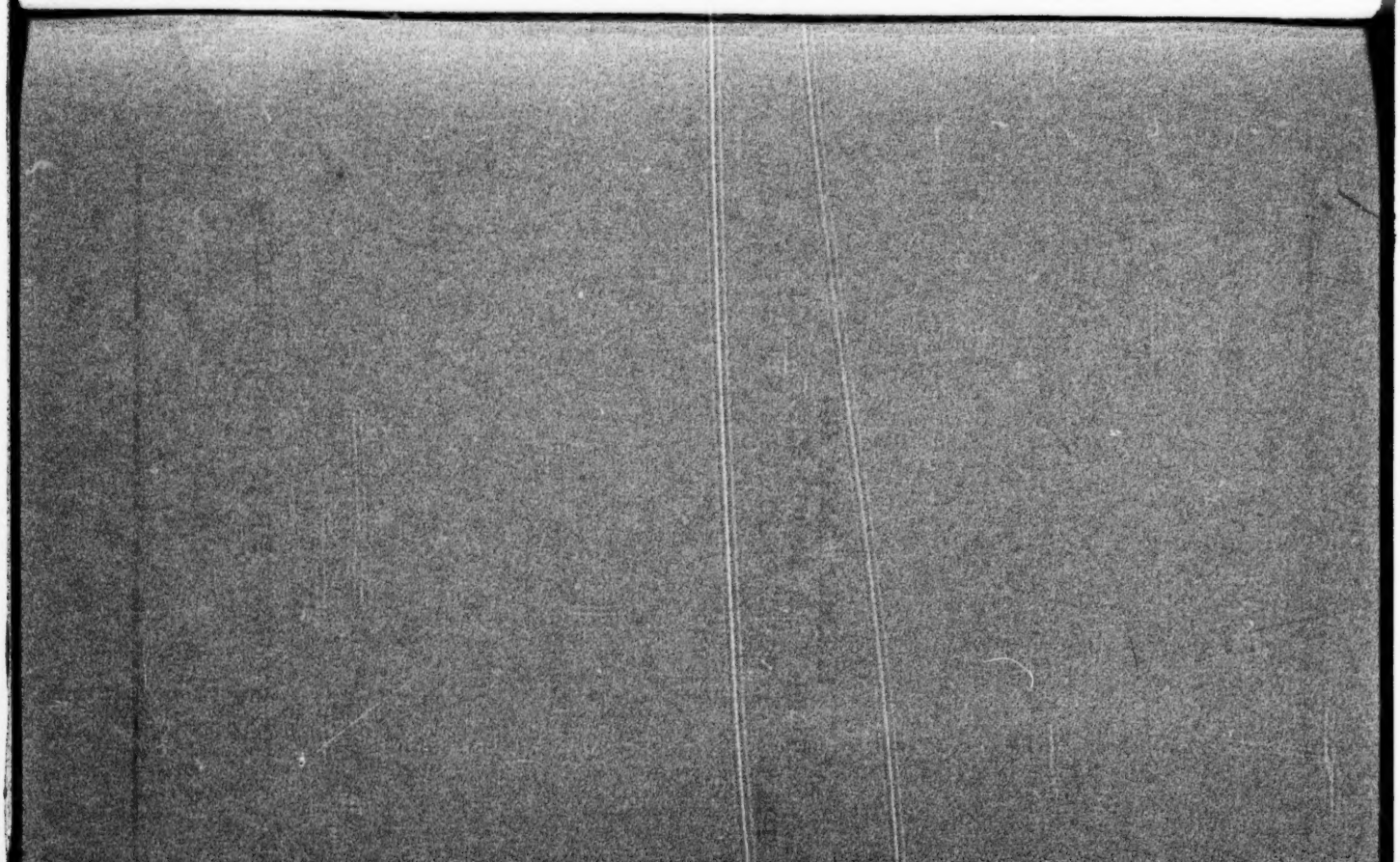
ALAN Y. COLE
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Of Counsel:

JAMES M. SHELLOW
222 East Mason Street
Milwaukee, Wisconsin 53202

October 30, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and rule involved	3
Statement of the case	4
Reasons for granting the writ	14
1. The ruling below concerning a defendant's right to inquire as to a prosecution witness' present address is (a) in conflict with prior decisions of this Court and (b) inconsistent with decisions of other Circuits	14
2. The ruling below conflicts with the decision of another Circuit as to the right of a defendant under the Jencks Act to secure the notes made during the prosecutor's interview of a Government witness	20
3. The ruling below as to the instruction on intent is concededly in conflict with decisions of other Circuits	22
4. The ruling below raises important problems as to a defendant's right under Rule 16(a)(2) to secure the detailed laboratory tests and analyses of cocaine seized from him	24
Conclusion	26
Appendix:	
Opinion of Tenth Circuit	1a
Denial of rehearing petition	19a

CITATIONS

CASES: Page

Alford v. United States, 282 U.S. 687 (1931) 9, 14, 15, 16, 17
Brady v. Maryland, 373 U.S. 83 (1953) 10, 20, 21
Garafolo v. United States, 390 U.S. 144 (1968) 17
Mann v. United States, 319 F.2d 404 (5th Cir. 1963)..23, 24
Palermo v. United States, 360 U.S. 343 (1959) 21
Saunders v. United States, 316 F.2d 346 (D.C.Cir. 1963) 21
Smith v. Illinois, 390 U.S. 130 (1968) 14, 15, 16, 17
United States v. Alston, 460 F.2d 48 (5th Cir. 1972) ..17, 19
United States v. Augenblick, 393 U.S. 348 (1969) 22
United States v. Barash, 365 F.2d 395 (2nd Cir. 1966) 23
United States v. Cook, 432 F.2d 1093 (7th Cir. 1970) .. 25
United States v. Dickens, 417 F.2d 958 (8th Cir. 1969) 16
United States v. Dioguardi, 428 F.2d 1033 (2nd Cir. 1970) 26
United States v. Driscoll, 454 F.2d 792 (5th Cir. 1972) 23
United States v. Garafolo, 385 F.2d 200 (7th Cir. 1967); 396 F.2d 952 (7th Cir. 1968) 16, 17
United States v. Guy, 456 F.2d 1157 (8th Cir. 1972) .. 23
United States v. Kelly, 420 F.2d 26 (2nd Cir. 1969) .. 26
United States v. King, 461 F.2d 53 (8th Cir. 1972) 25
United States v. Saletko, 452 F.2d 193 (7th Cir. 1971).. 17
United States v. Valeri, 407 F.2d 735 (7th Cir. 1969) .. 19
Wolford v. United States, 401 F.2d 331 (10th Cir. 1968) 13

STATUTES AND RULES:

Jencks Act, 18 U.S.C. § 3500 .....3, 10, 11
Public Law 91-452, 84 Stat. 933 20
Rule 16(a)(2), Federal Rules of Criminal Procedure 4, 24, 25

MISCELLANEOUS:

Cipes, Criminal Defense Techniques (1973) 25
Devitt and Blackmar, Federal Jury Practice and Instructions (1970) 22
Wright, Federal Practice and Procedure (1969) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Eugene L. Smaldone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 14, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 1a, *infra*. No opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 14, 1973. A timely petition for rehearing, plus a suggestion of rehearing *en banc,* was denied on August 31, 1973. See Appendix hereto, p. 19a, *infra.* On timely application, Mr. Justice White on September 24, 1973, ordered that the time for filing this petition for writ of certiorari be extended to and including October 30, 1973. This petition was filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal criminal defendant may be denied his established right to inquire as to the present address of a principal Government witness where (a) the sole Government objection is based on immateriality, (b) no claim, showing, objection or finding is made at trial that the question is harassing or that the answer might endanger the witness, and (c) the refusal to allow the question is affirmed on appeal by reliance on matters outside the trial record.

2. Whether, when a Government witness acknowledges at trial that he was earlier interviewed by the prosecutor concerning matters about which he testified and that the prosecutor transcribed the questions and answers on a legal pad, the defendant is entitled to the production of such material under the Jencks Act, 18 U.S.C. § 3500.

3. Whether, when a defendant is charged with a federal crime involving specific intent, it is reversible error to instruct the jury, over the defendant's objection, that "a person ordinarily intends the natural and probable consequences of acts knowingly done or

knowingly omitted . . . unless the contrary appears from the evidence."

4. Whether, in a federal narcotics case, a defendant is entitled, on motion under Rule 16(a)(2) of the Federal Rules of Criminal Procedure to the detailed laboratory findings and memoranda of chemical tests made by Government chemists of the seized narcotics, and, if not, whether the defendant is entitled to a brief continuance during the trial to analyze the reports of the test results that had not previously been tendered.

STATUTE AND RULE INVOLVED

Jencks Act, 18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

* * * * * * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule 16(a)(2), Federal Rules of Criminal Procedure:

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due deligence may become known, to the attorney for the government, . . .

STATEMENT OF THE CASE

A. The Proceedings Below

The petitioner Smaldone and one Larry Merkowitz were jointly indicted in the United States District Court for the District of Colorado for violations of federal narcotics laws. Following a jury trial, petitioner was acquitted of two substantive charges,[1] but was found guilty of Count III of the indictment, which had alleged a conspiracy among petitioner, Merkowitz and other named and unnamed persons to import cocaine in violation of 21 U.S.C. § 963. The petitioner was sentenced to ten years imprisonment and fined $10,000. The United States Court of Appeals for the Tenth Circuit on August 14, 1973, affirmed that conviction. See the Appendix hereto, p. 1a, *infra.*

[1] The petitioner was acquitted by the jury of Count II, which had charged him with aiding and abetting the importation of cocaine in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2. He was also acquitted of Count IV, which had charged him with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

The essence of the conspiracy, as alleged in Count III, was that the petitioner and Merkowitz did knowingly conspire "with each other and with Craig Mundt, Ronald Greenspan and other persons whose names are to the Grand Jury unknown," to import cocaine into the United States from Peru during a period from March 29 to June 9, 1972. The overt acts set forth in Count III stated that on May 11, 1972, Merkowitz gave to one Ronald Nocenti $18,500 with which to purchase cocaine in Peru; that the petitioner Smaldone caused a sum in excess of $9,000 to be delivered to Merkowitz to pay for the cocaine; that Greenspan and Mundt met with Nocenti at Aurora, Colorado; that Greenspan and Mundt went to Peru; and that the petitioner and Merkowitz accepted the delivery of the cocaine imported from Peru.

Prior to the return of the aforesaid indictment, the co-conspirators Mundt and Greenspan had been arrested by the Peruvian police. Throughout petitioner's trial, they remained incarcerated in a penitentiary outside Lima, Peru.

The evidence at the trial established that the co-conspirator Merkowitz was a pharmacist who operated a drugstore in Aurora, Colorado, and by his own admission had long been actively engaged in the illegal distribution of drugs. Prior to petitioner's trial, Merkowitz had pled guilty to the conspiracy charge and was provisionally sentenced in accordance with the provisions of 18 U.S.C. § 4208(b) to a maximum term of 15 years imprisonment. Following petitioner's trial, at which Merkowitz testified as a Government witness, Merkowitz was returned to court and the provisional sentence of 15 years was stayed. Merkowitz was thereupon placed on probation for five years and fined $10,000.

Another Government witness at the trial, who was not named as a co-conspirator, was Ronald Nocenti. He testified that he was a paid informer for the Bureau of Narcotics and Dangerous Drugs and that he had actually transferred the cocaine to the petitioner following a trip to Peru. On cross-examination, Nocenti acknowledged that he was given $5,000 in cash by the Bureau of Narcotics and Dangerous Drugs on the day following petitioner's arrest; $3,000 in cash two weeks after he testified before the grand jury that indicted petitioner; and $1,000 per month from the United States Marshal from the date of his grand jury testimony to the date of his trial testimony. He acknowledged that he performed no services for the Government, other than to testify, subsequent to the petitioner's arrest.

B. Cross-examination of Nocenti

The testimony of Nocenti was critical to the Government's case, for it was he who sought to tie the petitioner directly with the conspiratorial importation of concaine from Peru. Prior to the day of his arrest, petitioner had met Nocenti on only one occasion about three years earlier. During that three year interval, petitioner had no contact with Nocenti. Nocenti, as a paid informer, was the only witness who could testify to his conversation with petitioner at the time Nocenti delivered the package of cocaine to him.

Early in his cross-examination of Nocenti, defense counsel (Mr. Shellow) attempted to learn Nocenti's present address:

> Q. (By Mr. Shellow) What is your present address, Mr. Nocenti?

MR. COOPER: I object to that. That is immaterial, Your Honor.
THE COURT: Well—
MR. COOPER: Furthermore—
THE COURT: Are we going to have to call another recess, Mr. Shellow? What is the purpose?
MR. SHELLOW: To place the witness in the context of his environment.
THE COURT: At this time?
MR. SHELLOW: At this time. (T. 299)
THE COURT: No. The objection is sustained.
Q. (By Mr. Shellow) For how long have you lived at your present address, sir?
MR. COOPER: Objection, Your Honor.
THE COURT: Sustained. (T. 300)

No claim or assertion was made by the witness Nocenti that the question as to his present address would in any way harass, annoy or humiliate him; nor did he assert that revelation of his address would expose him to danger of any sort. The prosecutor (Mr. Cooper) likewise made no such claim or objection, merely asserting that the question was "immaterial." And in sustaining the objection that the question was "immaterial," the trial judge made no finding that the question was in any way harassing or that the answer might in any way endanger the physical health or well-being of the witness. Moreover, no document, exhibit or other testimony constituting any part of the trial record demonstrated any such factors bearing upon the request for Nocenti's present address.

Despite the uncontestable fact that the trial record shows only that the trial judge refused to allow the question on grounds of immateriality, the Tenth Circuit on appeal affirmed the refusal on quite different grounds:

(1) The petitioner knew the background of Nocenti and was allowed to cross-examine him in detail and thus "there was not present the usual necessity to bring out the address of the witness; and the defendant was not deprived of knowledge of where he lived and what his business was . . ." See p. 11a, *infra*.

(2) The trial court was said to have been "informed by the prosecution [before trial] that the witness had been relocated because there existed 'an apparent danger to the physical health and well-being' of the witness." See p. 11a, *infra*. This information, the Tenth Circuit said, "was contained in the government's objections to continuance which, although not specifically mentioning Nocenti, clearly referred to his situation." *Ibid.*

(3) Also, said the Tenth Circuit, "the U.S. Attorney had notified counsel for the defendant by letter that 'substantial reason to fear for his safety has been shown and he (Nocenti) has requested that his present whereabouts not be divulged.' " See p. 11a, *infra*.

(4) Relying upon an "organized crime report" that the petitioner had vainly sought to introduce in evidence in support of a pre-trial motion for change of venue, the Tenth Circuit asserted that the petitioner "admittedly had involvement in gambling and at the very least the court could have believed that revealing the address of the witness would stir apprehension in the mind of the witness and thereby affect his testimony." See p. 11a, at footnote 5, *infra*.

(5) Finally, according to the Tenth Circuit, counsel for petitioner "had reason to know that the government would object" to this question, yet "he did not seek to make a showing as to why he needed to

have the information or as to why it would have been proper to allow him to bring it out." See p. 11a, *infra*. Overlooking the record fact that defense counsel sought to ask the question precisely "to place the witness in the context of his environment" (T. 299),[2] the Tenth Circuit viewed this effort of defense counsel "as primarily tactical rather than as a desire to obtain the address." See p. 11a, *infra*.

C. Cross-examination of Merkowitz

Merkowitz, the co-defendant who pled guilty prior to trial, testified as a Government witness. At the trial he testified that all of the money he had given Nocenti for the purchase of cocaine had come from himself and petitioner. That testimony was consistent with three pre-trial statements of Merkowitz which had been produced and given to defense counsel prior to trial.

But there was one pre-trial statement of Merkowitz that was not produced and that appeared to be inconsistent with his trial testimony, a statement in which Merkowitz acknowledged that he had other investors in the cocaine venture. This statement had been given to the Assistant United States Attorney several days prior to trial. The Assistant United States Attorney had made notes on a yellow legal pad during this pre-

---

[2] Defense counsel's asserted need to ask this question was taken from this Court's opinion in *Alford* v. *United States*, 282 U.S. 687 (1931). The Court there said: "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting . . . The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." 282 U.S. at 692-693.

trial questioning of Merkowitz. On this matter, Merkowitz testified on cross-examination as follows:

> Q. Now, on the occasion of your seeing Mr. Cooper (Assistant United States Attorney) Tuesday or Wednesday last, as he asked questions of you and you made answers, he wrote down the answers which you gave, did he not?
>
> A. Yes, he did.
>
> Q. And occasionally he would read those back to you to be certain that what he had written down was a correct reflection of what you had said; isn't that right?
>
> A. Yes, sir; that's right.
>
> Q. And on the occasions that he read it back to you, it appeared to be an accurate rendition of what you had just told; isn't that right?
>
> A. Yes. (T. 158-159)

Prior to this series of questions it was clear to the witness that defense counsel was inquiring into matters which were related to the case and to the subject of the direct examination of the witness. (T. 156-158) Merkowitz testified that the answers were written down on a yellow legal pad. (T. 160)

Defense counsel moved for the production of the legal pad under the Jencks Act, 18 U.S.C. § 3500. (T. 160) Initially, the court reserved ruling on the motion (*Ibid.*); the motion was later denied upon the representation by the government that *United States* v. *Myerson,* 368 F. 2d 393 (2d Cir. 1966) held "specifically they are not Jencks Act statements." (T. 222-223) The court also refused counsel's request for an *in camera* inspection of these statements. At the close of the government's case-in-chief the motion was reasserted on authority of *Brady* v. *Maryland,* 373 U.S. 83 (1963); counsel also re-

quested that the court issue a "protective order requiring that these notes be kept by their present possessors in their present condition." The renewed motion and request for a protective order were denied. (T. 576-578) Merkowitz had acknowledged on redirect examination that during the interviews at which these notes were taken he had "given (Mr. Cooper) additional information that was not contained in (his) earlier statements." (T. 265) In denying production of these notes, the trial judge stated:

> THE COURT: Well, the Court's ruling on this is that in view of the testimony here that was related and the taking of notes by Mr. Cooper who is trying the case for the Government, just within the last few days, obviously in preparation for the trial, in the Court's opinion is not a 3500 statement and the request is denied. [See p. 6a, *infra*]
>
> * * * * * * * * *
>
> The latter part pertaining to Mr. Cooper's notes that he made in preparation for the trial of the action, the Court has already ruled that they are not producible, so that the request for the production of those notes and any order of the Court with reference thereto has to do with the attorney's work product, and it is denied. (T. 578)

The Tenth Circuit rejected the trial judge's notion that there is "a work product exception as such" to a defendant's right under § 3500 to secure a prosecutor's notes on interviewing a Government witness. See p. 8a, *infra*. But the appellate court affirmed the trial judge's refusal to order production of the notes on the grounds that (1) an insufficient foundation had been laid for production of the notes; (2) the prosecutor's notes, including "a partial reading back and verification," are not necessarily a "statement" within the meaning of

§ 3500; and (3) "in view of the vast extent of the cross-examination and the extensive prior statements of Merkowitz which were furnished to the defense, we fail to perceive prejudice." See pp. 7a-9a, *infra*.

D. The Instruction as to Intent

In instructing the jury as to the intent required to convict petitioner of the crime of conspiracy, the trial judge stated:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by him." [See p. 15a, *infra*]

The portion of this charge to which the petitioner objected was that which stated that "a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted . . . unless the contrary appears from the evidence . . ." The basis of the objection was that this language had the effect of shifting the burden of proof as to intent and removing from the Government the necessity of proving specific intent beyond all reasonable doubt.

The Tenth Circuit approved this charge, though acknowledging that it "has been much criticized and, in some instances, has been held to be clearly erroneous." See p. 15a, *infra*. In the court's view, "in the context presented the giving of it was not plain error . . . [and] we do not consider the instruction prejudicial." See

p. 16a, *infra*. The instruction, said the Tenth Circuit, "was not given in a manner which emphasized the objectionable clause," other parts of the instruction having "very correctly defined specific intent" and the questioned language having reference only "to proving intent by circumstantial evidence." *Ibid.*

E. The Chemical Tests

Proof that the substance received by petitioner from Nocenti was cocaine was essential to the proof of Overt Act No. 6 of the alleged conspiracy. Accordingly, prior to trial, the petitioner made a written request of the United States Attorney, pursuant to the local District Court Rule 31(c), for "the detailed laboratory findings, memoranda prepared by laboratory chemists, standards of these chemists and any records of the tests which these chemists performed upon the exhibits." This request was refused.

The petitioner then moved the court, pursuant to Rule 16(a)(2), Federal Rules of Criminal Procedure, to order the production of these data. The court denied the motion. At trial, the Government acknowledged that it had tendered to the petitioner only summaries of the laboratory findings and did not tender the requested laboratory analyses and tests.

Upon the tender of the test results during the course of the cross-examination of the Government's chemist at trial, the petitioner moved for a 48-hour continuance to analyze these reports, which had not previously been disclosed, and to confer with experts prior to further cross-examination. That motion was denied.

The Tenth Circuit, relying upon its earlier holding in *Wolford* v. *United States,* 401 F.2d 331, 333 (10th Cir. 1968), ruled that the trial judge had not abused his

discretion in denying the motion under Rule 16(a)(2). The essence of the *Wolford* decision is that it "is not contemplated that the government shall prepare the defense in criminal cases" where the procedures used by Government chemists "were fully explored on cross-examination." See pp. 14a-15a, *infra.*

The Tenth Circuit said nothing, however, about the trial court's refusal to allow a continuance to permit defense counsel to analyze the test results.

REASONS FOR GRANTING THE WRIT

1. The ruling below concerning a defendant's right to inquire as to a prosecution witness' present address is (a) in conflict with prior decisions of this Court, and (b) inconsistent with decisions of other Circuits.

For the express purpose of placing the key prosecution witness in this narcotics case "in the context of his environment," the defense counsel asked him "What is your present address, Mr. Nocenti?" The trial judge immediately sustained the Government's objection that such a question "is immaterial." Thus in affirming that action of the trial judge, the Tenth Circuit has rendered a judgment in direct conflict with this Court's decisions in *Alford* v. *United States,* 282 U.S. 687 (1931), and *Smith* v. *Illinois,* 390 U.S. 130 (1968). Those two decisions establish not only the materiality of such a question but the fair trial ingredient that adheres to the right to ask that question on cross-examination of a prosecution witness.

In *Alford,* a unanimous Court ruled that "the essence of a fair trial" (282 U.S. at 692) in the federal courts includes the right on cross-examination to identify a prosecution witness with his community or environment by asking him the question "Where do you

live?"[3] In *Smith*, the Court escalated that right to a constitutional level, ruling that a defendant in a state criminal proceeding is denied a right protected by the Sixth and Fourteenth Amendments when precluded from asking the correct name and present address of a key prosecution witness.[4]

By premising the effort to secure the witness Nocenti's address on the need to place him "in the context of his environment" and thus to challenge his credibility, the petitioner brought this case precisely within the rationale of *Alford* and *Smith*. Such a question is "an essential step in identifying the witness with his environment" (*Alford*, 282 U.S. at 693) and opens "countless avenues of in-court examination and out-of-court investigation" (*Smith*, 390 U.S. at 131). In other words, cross-examination of this nature must be allowed "so that independent testimony may be sought and offered of . . . [the witness'] reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased" (*Alford*, 282 U.S. at 691-692).

---

[3] In *Alford*, the Court noted the fact that upon cross-examination "questions seeking to elicit the witness's place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination." 282 U.S. at 688. The exclusion of the question in the instant case was premised on an identical objection by the Government.

[4] In *Smith*, when defense counsel asked the witness "Now, where where do you live now?" the prosecutor objected. Defense counsel replied, "This is material." The prosecutor repeated "Objection, Judge." The trial judge then ruled: "Yes, objection allowed." 390 U.S. at 131, footnote 6.

The conflict with *Alford* and *Smith* is exacerbated by the efforts of the Tenth Circuit to remove the instant case from the ambit of those controlling decisions. Thus the Tenth Circuit has asserted (see p. 11a, *infra*) that, because defense counsel had been "allowed to cross-examine him [Nocenti] in detail," there was "no lack of knowledge . . . as to the background of the witness Nocenti" and the petitioner "was not deprived of knowledge of where he lived and what his business was as was said in *Alford.*" But exactly the same argument had been advanced in the lower court opinion that was reversed by this Court in *Alford.*[5] And in *Smith,* the Court noted that, as in the instant case, "there was not, to be sure, a complete denial of all right of cross-examination" (390 U.S. at 131) and that it was enough that "there is no evidence in the record that either the petitioner or his lawyer knew . . . where he [the witness] was living at the time of this trial" (*Ibid.,* footnote 6). See also *United States* v. *Dickens,* 417 F.2d 958, 961-962 (8th Cir. 1969), which rejected the Government's argument that since other testimony indicated that the defendant was familiar with the witness and that the witness was placed in his general environment "the requirements of *Alford* . . . were met."[6]

---

[5] The lower court opinion that was disapproved in *Alford* had stated: "The witness was examined at great length concerning his relation to the appellant and great latitude was accorded in that examination." 282 U.S. at 691.

[6] The Eighth Circuit in *Dickens* also noted that a similar argument had been made by the Seventh Circuit in *United States* v. *Garafolo,* 385 F.2d 200, 207 (7th Cir. 1967), where the principal witness had been questioned concerning his address at an earlier point in time, his cooperation with the Government in this case, his previous convictions, possible monetary compensation, and possible promises of leniency—but not as to his address at the

But the major effort of the Tenth Circuit to distinguish *Alford* and *Smith* was directed toward placing this case within the so-called exception to the doctrine of those decisions, an exception articulated in Mr. Justice White's concurrence in *Smith* (390 U.S. at 133-134):

> In *Alford* . . . the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling.

Various Circuits have followed and applied the exception as carved out by Mr. Justice White. See, e.g., *United States* v. *Saletko,* 452 F.2d 193, 196 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), and cases there cited; *United States* v. *Alston,* 460 F.2d 48, 52 (5th Cir. 1972), and cases there cited.

Here, the Tenth Circuit purported to find what the trial court had not found — that there existed "an

---

time of trial. The Seventh Circuit thought that the witness had been "sufficiently identified with his community to enable appellant to investigate his reputation for truth and veracity in that community." 385 F.2d at 207. On certiorari, this Court vacated the Seventh Circuit's judgment and remanded for further consideration in light of the *Smith* decision, rendered the same day. *Garafolo* v. *United States,* 390 U.S. 144 (1968. On the remand, the Seventh Circuit reversed the conviction and ordered a new trial. *United States* v. *Garafolo,* 396 F.2d 852 (7th Cir. 1968).

apparent danger to the physical health and well-being" of the witness Nocenti, thus justifying the objection to the question as to his present address. See p. 11a, *infra*. It made that finding not by reference to any matter, claim or proof in the trial record but by searching outside that record and discovering:

(a) An inscrutable assertion by the Government in a pre-trial objection to a continuance that such apparent danger existed, an assertion "which, although not specifically mentioning Nocenti, clearly referred to his situation." See p. 11a, *infra*.

(b) A letter to defense counsel from the United States Attorney stating that fears for Nocenti's safety had been shown and requesting that his present whereabouts not be divulged. See p. 11a, *infra*.

(c) An "organized crime report" that the petitioner had sought to introduce in support of a motion for change of venue, which was said to show petitioner's "involvement in gambling." See p. 11a, *infra*. This report, which was not admitted into the record, was said to be such that the trial judge "could have believed that revealing the address of the witness would stir apprehension in the mind of the witness and thereby affect his testimony." *Ibid.*

The ruling below affords an opportunity for this Court to determine the propriety, the meaning and the scope of the exception expressed by Mr. Justice White. If the exception does indeed exist, can the danger be found outside the trial record? If, as Mr. Justice White has indicated, "the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question," should not that showing be made before the trial judge at the point in the trial when the de-

fense counsel seeks to inquire as to the address of the witness? Does not the defense counsel have a right to rebut any showing or claim made at that juncture of the trial? And if such a showing is not required at the time the question is asked, how can there be any assurance that the the trial judge's discretion to disallow the question has been intelligently exercised?

Dealing with some of those questions, the Fifth Circuit has stated that "Of course, it should be the Government that comes forward with an explanation of its objection to the divulging of an address by any witness." *United States* v. *Alston,* 460 F.2d 48, 53 (5th Cir. 1972). Faced with an off-the-record bench colloquy at the time the question was put, the Fifth Circuit nonetheless relied in *Alston* on other matters in the trial record to justify the trial judge's refusal to allow the address to be revealed. The Seventh Circuit has suggested that "one solution may be to require submission by the government of the relevant information to the district judge *in camera* for him to decide whether disclosure would present a real problem. . . . such decision would be reviewable on appeal." *United States* v. *Varelli,* 407 F.2d 735, 750, fn. 11 (7th Cir. 1969). The Tenth Circuit, in its opinion below (see p. 11a, *infra*), ignored the idea of an *in camera* inspection and made a contrary suggestion that the burden is on the defendant "to make a showing as to why he needed to have the information or as to why it would have been proper to allow him to bring it out."

The procedural problems involved in applying the exception created by Mr. Justice White in his *Smith* concurrence continue to plague the Circuits. Moreover, there is every reason to expect that these problems will arise with frequency in the future because of the Gov-

ernment's heavy reliance upon informers in narcotics cases and upon witnesses in organized crime cases. See Public Law 91-452, Title V, §§ 501-504 (1970), 84 Stat. 933. The problems are presented here on a trial record that shows (a) no claim or showing by either the witness or the Government that revelation of the address would endanger the witness, and (b) a sustaining of the Government's objection that the question as to the address was "immaterial." The Tenth Circuit's forced reliance on ambiguous, dated and irrelevant matters outside that record serves to present the procedural problems to this Court in their sharpest and most unavoidable form.

2. The ruling below conflicts with the decisions of another Circuit as to the right of a defendant under the Jencks Act to secure the notes made during the prosecutor's interview of a Government witness.

During the trial, in the light of information adduced during the cross-examination of Merkowitz, petitioner requested the production as a Jencks Act statement of the notes made during an interview of Merkowitz by the prosecutor two or three days prior to trial. The trial judge denied the request on the ground that the prosecutor's notes constituted work product and were therefore not encompassed by the Jencks Act. It also rejected petitioner's subsequent request for these notes on the authority of *Brady* v. *Maryland,* 373 U.S. 83 (1963).

While acknowledging that there is not a work product exception to the Jencks Act production requirements, the Tenth Circuit's holding that the United States Attorney's notes of his interview with Merkowitz are not a "statement" within the meaning of the Jencks Act conflicts with rulings of at least one other Circuit.

To begin with, the Tenth Circuit's approval (p. 6a, *infra*) of the trial judge's refusal to conduct an *in camera* inspection of the prosecutor's notes, given their debatable character as a Jencks Act "statement," is inconsistent with this Court's admonition in *Palermo* v. *United States,* 360 U.S. 343, 354 (1959): "However, when it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *in camera* inspection. Indeed, any other procedure would be destructive of the statutory purpose."

The notes in question were not shown to be a truncated version of the interview, and the partial reading back and verification by the witness were not shown to have affected the materiality and relevance of the notes as a whole. Indeed, the witness conceded that his answers contained "additional information that was not contained in earlier statements" (T.265) that were furnished the defense.

In such circumstances, at least one other Circuit has ruled such notes are "substantially verbatim recitals" within the meaning of subsection (e)(2) of the Jencks Act and hence are producible as a "statement". See, e.g., *Saunders* v. *United States,* 316 F.2d 346, 349-350 (D.C. Cir. 1963). Moreover, since the answers given to the prosecutor contained information not otherwise available and which might have been favorable to the defense, production was additionally necessary to insure that there was no "suppression by the prosecution of evidence favorable to an accused." *Brady* v. *Maryland, supra,* 87 (1963). But in its effort to find a different basis to sustain the District Court's concededly erroneous ruling, the Tenth Circuit failed

to recognize the *Brady* implications which arise in denying this information to a defendant.

The problem of when the prosecutor's notes are producible under the Jencks Act is a continuing one that deserves further consideration by this Court. See *United States* v. *Augenblick*, 393 U.S. 348, 354-356 (1969), where the imprecise nature of the record precluded this Court from making a definitive resolution of the problem. The record here is clear and precise, making it appropriate to grant certiorari to resolve what was left unresolved in *Augenblick*.

3. The ruling below as to the instruction on intent is concededly in conflict with decisions of other Circuits.

The trial judge instructed the jury over petitioner's timely objection that, "unless the contrary appears from the evidence," the jury could infer that a person "ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted." The Tenth Circuit approved that instruction, rejecting petitioner's contention that the instruction had the effect of shifting the burden of proof to the defendant on the issue of intent to conspire.

The court below acknowledged (p. 15a, *infra*) that this instruction "has been much criticized and, in some instances, has been held to be clearly erroneous," citing the critical analysis of the instruction and the citation of the relevant cases contained in Devitt and Blackmar, Federal Jury Practice and Instructions § 13.06 (1970).[7] Among the Circuit decisions holding

[7] ". . . the propriety of using this portion of the charge is now in severe doubt. Although repeatedly criticized * * * an instruction of this general tenure continues to appear in charges to the jury. Its use is an invitation to reversal." Devitt and Blackmar, *supra*, at 277.

that the giving of the instruction is erroneous, and in some instances reversible error, are *United States* v. *Barash,* 365 F.2d 395, 402-403 (2nd Cir. 1966); *Mann* v. *United States,* 319 F.2d 404, 409-410 (5th Cir, 1963); *United States* v. *Driscoll,* 454 F.2d, 792, 795 (5th Cir. 1972); *United States* v. *Guy,* 456 F.2d 1157, 1164 (8th Cir. 1972). Other Circuits, cited in the opinion below (p. 16a, *infra*), have held to the contrary.

Only this Court can resolve the conflict that has split the Circuits on this type of jury instruction. Trial courts should not be required to guess whether they are giving an "invitation to reversal"; if this instruction is impermissible, this Court should say so with clarity.

Particularly in the context of a conspiracy prosecution, where the intent to conspire may be inferred from an otherwise innocent act, it is important that the lower courts be advised whether the jury can be so instructed as to throw the burden on the defendant to disprove that he committed an otherwise innocent act with criminal intent. As was said by the Fifth Circuit in *Mann* v. *United States,* 319 F.2d 404, 409 (5th Cir. 1963), while a jury may be charged that a defendant is presumed to intend the natural consequences of his own acts,

> When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption.

One word need be added as to the Tenth Circuit's view (p. 16a, *infra*) that the instruction was not here

prejudicial since it was "ringed around with charges" correctly placing the general burden of proof on the Government and correctly defining specific intent. That view is in diametric conflict with that expressed by the Fifth Circuit in the *Mann* case, 319 F.2d at 410, which held that the giving of an accurate charge on specific intent and the burden of proof does not cure so erroneous an instruction as that here involved. In the Fifth Circuit's words: "Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another instruction."

4. The ruling below raises important problems as to a defendant's right under Rule 16 (a)(2) to secure the detailed laboratory tests and analyses of cocaine seized from him.

The Tenth Circuit hastily disposed of petitioner's claim that he was entitled under Rule 16 (a) (2) of the Federal Rules of Criminal Procedure to a disclosure of the detailed laboratory findings and test records with respect to the cocaine seized from him and Merkowitz, See pp. 14a-15a, *infra*. It merely cited a prior decision of its own to the effect that the Government need not prepare the defense in criminal cases, at least where the laboratory procedures and tests are fully explored on cross-examination.

But Rule 16(a)(2) was not designed to be so easily brushed aside. While the Rule declares that upon motion the court "may" order the reports of "scientific tests or experiments made in connection with the particular case" within the Government's possession, Professor Charles Alan Wright has observed that, despite the Rule's use of the word "may," such materials are "obtainable virtually as of right under Rule 16(a)" and "should now be routinely discoverable." 1

Wright, Federal Practice and Procedure § 253, pp. 506-507 (1969).

In this case, petitioner was tendered two documents by the Government. One merely advised that the substance seized from Merkowitz had been analyzed and found to be pure cocaine; the other advised that the substance seized from petitioner was also pure cocaine. Neither document informed petitioner of the tests or analyses upon which these conclusions were based, nor of the results of those tests. Petitioner was thus unable to cross-examine the Government chemist in the light of the tests he actually performed.[8]

The purpose of Rule 16(a)(2) is not to convert a criminal trial into a game of surprises or to withhold from the defendant vital incriminating information. See *United States* v. *King,* 461 F.2d 53, 57, footnote 5 (8th Cir. 1972). Nor is it designed to permit disclosure only of the conclusions and opinions of an expert witness prior to trial. It necessarily encompasses the scientific tests and transcribed results that petitioner repeatedly sought in this case.

This case thus presents an opportunity for a definitive demarcation of the scientific tests and laboratory analyses that should be made available to a defendant under Rule 16(a)(2). The problems are recurring in nature; and the lower courts are in need of this Court's guidance. See *United States* v. *Cook,*

---

[8] "Scientific tests may often be the critical evidence linking the defendant to the crime. Since such evidence is given by presumably 'disinterested' experts, it has high probative value to a jury. Moreover, expert witnesses are almost impossible to cross-examine, and expert testimony almost impossible to rebut, without intensive pretrial preparation." 1 Cipes, Criminal Defense Techniques, p. 10-12 (1973)

432 F.2d 1093, 1096-1102 (7th Cir. 1970); *United States* v. *Dioguardi,* 428 F2d 1033, 1038-1039 (2nd Cir. 1970); *United States* v. *Kelly,* 420 F.2d 26, 29 (2nd Cir. 1969). And the problems are here accentuated by the refusal of the trial court to allow a continuance during trial to permit defense counsel to analyze the test reports upon which the Government expert's testimony was based and which had not previously been made available to the defense.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN Y. COLE
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Of Counsel:

JAMES M. SHELLOW
222 East Mason Street
Milwaukee, Wisconsin 53202

October 30, 1973

422 F.2d 1093, 1096-1102 (7th Cir. 1970); *United States v. Dioguardi*, 428 F.2d 1033, 1038-1039 (2nd Cir. 1970); *United States v. Kelly*, 420 F.2d 26, 29 (2nd Cir. 1969). And the problems are here accentuated by the refusal of the trial court to allow a continuance during trial to permit defense counsel to analyze the test reports upon which the Government expert's testimony was based and which had not previously been made available to the defense.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN I. COHN
1730 K Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

Of Counsel:

JAMES M. SHELLOW
722 East Mason Street
Milwaukee, Wisconsin 53202

October 30, 1973

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1973

No. 73-1081

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

EUGENE L. SMALDONE, *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(D. C. No. 72-CR-183)

James M. Shellow, Milwaukee, Wisconsin (Of Counsel: Stephen M. Glynn of Shellow & Shellow, Milwaukee, Wisconsin, and Peter H. Ney, Englewood, Colorado, on the brief), for Defendant-Appellant.

Paul D. Cooper, Assistant United States Attorney, Denver, Colorado (James L. Treece, United States Attorney, on the brief), for Defendant-Appellant.

[August 14, 1973]

Before PHILLIPS, HILL and DOYLE. Circuit Judges.

DOYLE, Circuit Judge.

The appellant seeks reversal of a judgment of conviction and a sentence of ten years. He was charged in Count III of the indictment with conspiracy to import cocaine in violation of 21 U.S.C. § 963. He had been charged also in the same indictment in Count II with aiding and abetting importation of cocaine contrary to 21 U.S.C. § 952(a) and 18 U.S.C. § 2, and Count IV charged him with possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1).

Trial was to a jury which returned verdicts of not guilty as to Counts II and IV and of guilty of Count III, conspiracy.

In the third count it was alleged that on or about March 29, 1972, and continuing to June 9, 1972, defendant and Larry A. Merkowitz wilfully and knowingly combined, conspired, confederated and agreed together with each other and with Craig Mundt, Ronald Greenspan and other persons to knowingly and intentionally import cocaine. The overt acts set forth in Count III of the indictment state that on May 11, 1972, Larry A. Merkowitz gave to Ronald Nocenti $18,500 with which to purchase cocaine in Peru; that Eugene L. Smaldone caused a sum in excess of $9,000 to be delivered to Larry A. Merkowitz to pay for the cocaine; that Ronald Greenspan and Craig Mundt met with Ronald Nocenti at Aurora; that Greenspan and Mundt went to Peru; and that Merkowitz and Smaldone accepted delivery of cocaine imported from South America.

The evidence established that Larry A. Merkowitz was a pharmacist who operated a drugstore in Aurora, Colorado, and Nocenti was a paid government informant. The plan called for Mundt, Greenspan and Nocenti to go to Peru, buy the cocaine and deliver it to Merkowitz and Smaldone. All of this commenced in April 1972, when Smaldone first met Merkowitz who told him of the scheme. According to Merkowitz, Smaldone said that he was interested in investing in the deal, and subsequently Smaldone was told that cocaine would cost $6,500 per kilo. Thereafter, Smaldone met with Merkowitz at his pharmacy and delivered $8,750 stating that he would furnish an additional $1,000 so that he could buy one and one-half kilos. An equal amount was contributed by Merkowitz and the total was transferred to Nocenti who went to Peru and there by prearrangement met Mundt and Greenspan. Merkowitz had had some previous transactions in cocaine, and on or about April 13, 1972, he told Nocenti that Mundt and Greenspan wanted

Nocenti to participate in smuggling cocaine from Ecuador. Later, Merkowitz told Nocenti that he was to be included. Two days after that Merkowitz met Smaldone at the apartment of one Judy Good. The discussion had to do with obtaining vitamins for Good's racing dogs. According to Merkowitz, he asked Smaldone on this occasion if he knew Mundt and Greenspan and was aware of their proposed smuggling venture. According to further testimony of Merkowitz, Smaldone stated that he would be interested in investing in this. On May 4, 1972, Merkowitz took Nocenti to Mundt's ranch east of Broomfield. Nocenti there met with Mundt and Greenspan. The very next night Merkowitz told Smaldone that Mundt, Greenspan and Nocenti had made arrangements for the trip to Peru and the cocaine was to cost $6,500 per kilo. According to Merkowitz, Smaldone said that he did not trust Mundt and he was curious as to the trustworthiness of Nocenti. He questioned Merkowitz about this. Smaldone also said that he was not sure that he wanted his share of the cocaine to be sold by Nocenti or to be sold by himself. Merkowitz in turn borrowed money from the Aurora National Bank and delivered $9,750, the same amount that Smaldone had furnished to Nocenti on May 11, 1972. Nocenti returned from Peru on May 29, 1972.[1]

On May 29, 1972, Smaldone informed Merkowitz that Nocenti was back in town. Merkowitz tried to arrange a meeting between him, Nocenti and Smaldone. Merkowitz met Nocenti and following the delivery of a briefcase to him Merkowitz was arrested.

Nocenti also contacted Smaldone. The latter went to the Sheraton Motor Inn and met with Nocenti, accepting a packet containing alleged cocaine and he was arrested on that occasion.

---

[1] We gather that Mundt and Greenspan were arrested in Peru and that Nocenti brought $17,500 of the money back with him and also some samples of cocaine seized by the Peruvian police.

Merkowitz testified at great length, particularly on cross-examination. His pretrial investigative statements were furnished to the defendant. Included was an affidavit which he had made to the agents of the Bureau of Narcotics and Dangerous Drugs. Also included was a question and answer statement (13 pages long) and a statement which he had given to the probation officers in connection with the presentence investigation which they conducted. A few days before trial he was examined extensively by the Assistant United States Attorney who, according to the finding of the court, was then preparing for trial. These were questions and answers, and in some instances the U. S. Attorney had Merkowitz verify the answer that he had just given.

Some difficulty arose during the trial concerning the sufficiency of the government's proof to establish that the substance delivered was cocaine. It would appear that this is largely the reason for the acquittal on Counts II and IV.

Numerous and varied points are advanced by Smaldone in support of this appeal. There are a number of pretrial motions (1) seeking dismissal on the ground that the classification of cocaine as a narcotic is invalid; (2) that the motion for a bill of particulars to require identity of persons alleged in the indictment to be to the Grand Jury unknown was denied, and also denial of the requested disclosure of unindicted co-conspirators; (3) the motion for pretrial discovery of results or reports of scientific tests or experiments. (4) It is also contended that the court committed error in limiting cross-examination of Merkowitz and particularly in refusing to require the production of the question and answer statement taken by the U. S. Attorney just before the trial. It is said that this was subject to production under the Jencks Act, 18 U.S.C. § 3500; (5) refusal of the court to allow defendant's counsel to elicit the present address of the witness Nocenti; (6) refusal of the court to give submitted instructions and the giving by the court of an erroneous instruction on intent.

I.

Cross-Examination of Merkowitz and the 18 U.S.C. § 3500 Problem

Complaint is made that the trial court limited counsel's cross-examination of the witness Merkowitz and committed specific error in refusing to require the U. S. Attorney to produce his own notes taken while interviewing Merkowitz immediately prior to trial.

It is important to note that the cross-examination extended over some 90 pages in the record. It addressed itself to a variety of subjects and there is no evidence to suggest that it was curtailed or limited. The one point which requires discussion is the refusal of the court to require the U. S. Attorney to produce his notes. On this it is important to mention that virtually every investigative statement made by Merkowitz was furnished to the defense. Merkowitz had given an extensive and detailed affidavit to the narcotics agents and this was furnished to the defendant. So also was a question and answer statement conducted by the narcotics agents (13 pages in length). The court even allowed the defense to have the statement given by Merkowitz to the probation officers following his plea of guilty, noting that this was not in the custody of the prosecution and hence was not strictly speaking a § 3500 statement, but the court gave it over regardless. In the course, however, of the very thorough and competent cross-examination by counsel for the defendant, it appeared that Merkowitz had been questioned by the prosecution a few days prior to testifying. There was a questioning on Wednesday and further questioning on Thursday. Notes were made by the Assistant U. S. Attorney on a yellow pad. On cross-examination defense counsel brought out that the Thursday interview was a two-hour one by the U. S. Attorney at which some of the answers were written down. Merkowitz stated that the U. S. Attorney "made notes."

He was then asked if the U. S. Attorney would read them back to him on occasion to make sure that they were accurate. The response was "Sometimes." Based upon that one answer, counsel moved for production of the yellow pad. The court reserved a ruling on that, presumably to allow counsel to develop the subject further. Counsel did not, however, choose to do so.

At the conclusion of Merkowitz' cross-examination, the court noted that it had not ruled on counsel's demand. The U. S. Attorney objected, citing United States v. Myerson, 368 F.2d 393 (2d Cir. 1966). Defense counsel offered no authority, merely saying that there was a conflict between the work product of the U. S. Attorney and the mandate of § 3500, and that in any criminal case the work product of the U. S. Attorney must yield. Counsel then demanded that the court conduct an *in camera* inspection of those notes. Based upon the facts presented by defense counsel, the court ruled that the material demanded was not a § 3500 statement. The Judge said:

> THE COURT: Well, the Court's ruling on this is that in view of the testimony here that was related and the taking of notes by Mr. Cooper who is trying the case for the Government, just within the last few days, obviously in preparation for the trial, in the Court's opinion is not a 3500 statement and the request is denied.

Much is now made of this refusal. The question is whether the notes made by the U. S. Attorney from these interviews qualified as statements as that definition is given in 18 U.S.C. § 3500.[2]

---

[2] It provides:

> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

The statute in question was adopted by Congress following the Supreme Court's decision in Jencks v. United States, 353 U.S. 657 (1957). The object of the statute was to protect government files from unwarranted disclosure, but at the same time to allow defendant to review material which could be regarded as a statement for the purpose of impeachment. *See* Palermo v. United States, 360 U.S. 343 (1959); Ayash v. United States, 352 F.2d 1009 (10th Cir. 1965).

Since the adoption of § 3500 the cases have held that the defendant has the burden of showing that a particular statement qualifies as such and is subject to production. *See* Annot., 1 A.L.R. Fed. 252 (1969) and the cases there cited. No such showing was here made. All we have to go on is that the Assistant U. S. Attorney made some notes of the interview plus some reading back, and the record supports the conclusion that these were made as a part of his preparation for trial. Counsel chose to stand on one fact brought out by him to the effect that occasionally the U. S. Attorney read back an answer. From this he would have us hold that this material qualified as a statement. Even as to the reading back, we are not told whether the answers read were verbatim or substantially so. For this reason alone the statement does not qualify. *Cf.* Campbell v. United States, 373 U.S. 487, 492 (1963) and *see* United States v. Augenblick, 393 U.S. 348 (1969), wherein a government agent questioned a witness and made rough pencil notes of the conversation. The Supreme Court through Mr. Justice Douglas ruled that due to the inadequacy of the record presented it was impossible to ascertain the

---

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

nature of the notes and the Court chose to rely on the trial judge's "good sense and experience." To the same effect is United States v. Lamma, 349 F.2d 338 (2d Cir.), *cert. denied,* 382 U.S. 946 (1965), and *see* the cases cited in Annot., 5 A.L.R. 3d 763 (1966). In summary, the vagueness of the presentation by defendant designed to establish that the notes constituted a statement is a sufficient answer. We are not disposed to react on any ritualistic basis merely because there was some reading back.

We recognize that there is not a work product exception as such and we do not base our ruling on any such rule. *See* United States v. Hilbrich, 341 F.2d 555, 557 (7th Cir.), *cert. denied,* 381 U.S. 941 (1965). *Cf.* United States v. Augenblick, *supra,* and United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966), *cert. denied,* 386 U.S. 991 (1967). At the same time, the courts have shown some reluctance to treat attorneys' notes as statements absent a showing that they satisfy the statutory definition. *See* United States v. Gosser, 339 F.2d 102, 113 (6th Cir. 1964), *cert. denied,* 382 U.S. 819 (1965). *Cf.* United States v. Spatuzza, 331 F.2d 214, 218 (7th Cir.), *cert. denied,* 379 U.S. 829 (1964); United States v. Crosby, 294 F.2d 928, 951 (2d Cir. 1961), *cert. denied sub nom.* Mittelman v. United States and Meredith v. United States, 368 U.S. 984 (1962). Thus, the cases have inclined to rule that material which was notes rather than statements was not shown to be narrative, for example. United States v. Hoffa, 349 F.2d 20, 48 (6th Cir. 1965), *aff'd on other grounds,* 385 U.S. 293 (1966). *See also* United States v. Aviles, 315 F.2d 186, 191-92 (2d Cir.), *vacated and remanded,* 375 U.S. 32 (1963), *on remand aff'd,* 337 F.2d 552 (2d Cir. 1964), *cert. denied,* 380 U.S. 906 (1965).[3] To the same effect is United States v. Thomas,

[3] In that case it was said:

> In determining whether the Shaw notes were "statements" within the Jencks Act definition of that term, 18 U.S.C. § 3500(e), the cases provide certain well-defined criteria to

282 F.2d 191, 194 (2d Cir. 1960). *Cf.* Dennis v. United States, 346 F.2d 10, 20 (10th Cir. 1965), *vacated on other grounds,* 384 U.S. 855 (1966); Johnson v. United States, 269 F.2d 72 (10th Cir. 1959).

The fact that there is a partial reading back and verification does not necessarily render the material a statement. *See* Matthews v. United States, 407 F.2d 1371 (5th Cir. 1969), *cert. denied,* 398 U.S. 968 (1970); United States v. Scaglione, 446 F.2d 182, 183-84 (5th Cir.), *cert. denied,* 404 U.S. 941 (1971). *See also* Menendez v. United States, 393 F.2d 312, 316 (5th Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969).[4]

Finally, in view of the vast extent of the cross-examination and the extensive prior statements of Merkowitz which were furnished to the defense, we fail to perceive prejudice. *See* Rosenberg v. United States, 360 U.S. 367 (1959). *Cf.* Government of Virgin Islands v. Lovell, 410 F.2d 307 (3d Cir.), *cert. denied,* 396 U.S. 964 (1969).

---

assist us. Such a statement must, of course, be "a substantially verbatim recital of an oral statement made by [the] witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e)(2). The statement must fairly be the witness' own words." Palermo v. United States, 360 U.S. 343, 352, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). It must "reflect fully and without distortion what had been said to the government agent." Ibid. The distortion which Congress sought to avoid by its narrowly-drawn definition "can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions." Thus, "a report which merely selects portions, albeit accurately, from a lengthy oral recital" will not be producible under the Act. Ibid.

[4] In these cases generally there existed something less than verbatim adoption or an exact replica of the statement.

II.

Refusal to Allow Defendant to Elicit the Address of Nocenti

The witness in question was a paid government informant. As one would expect, the defendant was allowed to cross-examine him regarding his relationship to the government in minute detail. But the court sustained the government's objection to the question as to the witness's present address and this is assigned as error citing the Supreme Court in Alford v. United States, 282 U.S. 687 (1931) and Smith v. Illinois, 390 U.S. 129 (1968) which hold that the right to cross-examine is constitutional in nature.

Ordinarily the question of address is a pertinent one having for its purpose the presentation of a background setting against which to test the credibility of the witness. This is not, however, invariable. In Smith v. Illinois, 390 U.S. 129 (1968), the Supreme Court noted that a trial judge is under a duty to protect the witness from questions which go beyond the bounds of proper examination merely "to harass, annoy or humiliate" him, quoting from Alford v. United States, *supra*. In *Smith*, for example, the witness was using a fictitious name and his address was of some importance in establishing his identity. Here, with all of the pretrial investigation and discovery and the very extensive cross-examination, no such problem existed. Moreover, the witness was not a permanent resident of Denver and, as will be shown, there existed at least some problem of protection, and the lower federal courts have interpreted the Supreme Court's language concerning harassment, annoyance or humiliation to include exposure of the witness to danger. *See* United States v. Alston, 460 F.2d 48, 51-2 (5th Cir. 1972) and the cases cited therein. *See also* United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972).

In the case at bar then there was no lack of knowledge on the part of the defendant as to the background of the witness Nocenti. Counsel was allowed to cross-examine him in minute detail. Thus, there was not present the usual necessity to bring out the address of the witness; and the defendant was not deprived of knowledge of where he lived and what his business was as was said in *Alford*. Also, the trial court had been informed by the prosecution that the witness had been relocated because there existed "an apparent danger to the physical health and well-being" of the witness. This was contained in the government's objections to continuance which, although not specifically mentioning Nocenti, clearly referred to his situation. Also, the U. S. Attorney had notified counsel for the defendant by letter that "substantial reason to fear for his safety has been shown and he (Nocenti) has requested that his present whereabouts not be divulged." The defendant admittedly had involvement in gambling and at the very least the court could have believed that revealing the address of the witness would stir apprehension in the mind of the witness and thereby affect his testimony.[5]

Counsel for the defendant had reason to know that the government would object to this. Nevertheless, he did not seek to make a showing as to why he needed to have the information or as to why it would have been proper to allow him to bring it out. We view the effort of defense counsel as primarily tactical rather than as a desire to obtain the address. All in all, we think that the trial court was within its rights in denying this effort.

---

[5] *See also* defendant's Exhibit Q, Volume 11 of the record, an organized crime report which was called to the court's attention in support of motion for change of venue. The court refused to receive it in evidence on this occasion. Since this was tendered by the defendant it cannot be successfully argued that the trial judge was unaware of the possible connection of the defendant with organized crime.

Nor do we find abuse of discretion in the trial court's sustaining the objection as to whether Merkowitz had any hope or expectation that his sentence would be reduced based upon his testimony. Here again it was only the conclusory question that the court refused to allow. All of the other questions regarding any factual matter pertaining to promises, threats or other inducements were explored fully. Hence we see no prejudice.[6] Moreover, the question was somewhat repetitious or cumulative.[7]

We have considered the other instances in which the trial court limited the cross-examination of Merkowitz. An example is the dates when he had opened his safety deposit box so as to open up the inference that he obtained the money for the cocaine from that source and the cross-examination regarding his owing money to a third person. These were efforts on the part of counsel for the defendant to establish his theory of the case. Being beyond the scope of the direct examination, it was proper for the court to sustain the objections.

III.

The Motion to Dismiss the Indictment

The defendant's contention is that the classification of cocaine as a narcotic drug in the statute is arbitrary, capricious and lacking in reason. Demand was made for an evidentiary hearing. The court denied this request. Although an evidentiary hearing was not granted in respect to this, the trial court did receive affidavits on this

---

[6] *See* United States v. *McCowan*, 471 F.2d 361, 364 (10th Cir. 1972); United States v. Amabile, 395 F.2d 47, 51-2 (7th Cir. 1968).

[7] Nipp v. United States, 422 F.2d 509, 512-14 (10th Cir.), *cert. denied*, 397 U.S. 1008 (1970); United States v. Mahler, 363 F.2d 673, 677-78 (2d Cir. 1966). *See also* Hudson v. United States, 387 F.2d 331 (5th Cir. 1967), *cert. denied*, 393 U.S. 876 (1968); Orozco-Vasquez v. United States, 344 F.2d 827 (9th Cir.), *cert. denied*, 386 U.S. 1010 (1967).

question and concluded that the classification was proper. The judicial approach to this kind of question is that the classification will be upheld if any facts justify it. *See* United States v. Md. Savings-Share Ins. Corp., 400 U.S. 4 (1970). Moreover, the facts contained in the affidavits, in addition to the government's reply to the motion and case law, supported the reasonableness of the statutory classification. *See* Erwing v. United States, 323 F.2d 674 (9th Cir. 1963); Padilla v. United States, 278 F.2d 188 (5th Cir. 1960). We see no merit in the argument.

IV.

The Motion for Bill of Particulars and Other Discovery Efforts

A. Defendant sought an order requiring disclosure of names of co-conspirators alleged in the indictment to be "other persons whose names are to the Grand Jury unknown." The prosecution stated in open court that the names were not known at the time of the return of the indictment and had not been ascertained since that time. An examination of the indictment in light of the evidence presented convinces us that it was adequate to advise the defendant as to the factual transaction on which the indictment is based. There was no problem of surprise and no problem of vagueness or indefiniteness. Defendant was apprised of the charge against him and was not prejudiced in the preparation of his defense. The government has continued to state that there was no known information withheld about other persons involved in the conspiracy. We see no abuse of discretion. Rule 7 Fed.R.Crim.P.; Wyatt v. United States, 388 F.2d 395, 397 (10th Cir. 1968).

B. A related matter is the effort of defendant to ascertain whether an indictment had been returned against Mundt and Greenspan. At the time these two named co-conspirators were incarcerated in Peru on charges growing

out of the transaction now under consideration. The contention of the defendant was that these two individuals had information which could exculpate the defendant at bar, but would not reveal their information by deposition unless they could have assurance that they would not be proceeded against in Colorado. The simple answer is that the existence of an indictment or the non-existence would not answer the need because even if there were no indictment this would not mean that there would not be one in the future. In any event, an indictment may under Rule 6(e) be kept secret in order to avoid fleeing from justice. Hence, discovery is in the discretion of the court. The court did not abuse its discretion. *See* United States v. Lewis, 406 F.2d 486, 493 (7th Cir. 1969); United States v. Deloney, 389 F.2d 324, 325 (7th Cir. 1968); *cf.* United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972).

C. Appellant also alleges as error the trial court's denial of his motion made under Rule 16 Fed.R.Crim.P. to disclose detailed laboratory findings and any records of tests with respect to the cocaine seized from Merkowitz and appellant.

Following appellant's request, the government provided the defense with two documents which stated that the substance seized from Merkowitz and the substance seized from appellant had been analyzed and found to be pure cocaine. In addition to these produced results, the substance itself was offered to the defense.

Under Rule 16, the court may order the government to inspect any relevant results or reports of scientific tests or experiments made in connection with a case. A motion made under the discovery rules is within the sound discretion of the trial court and is reviewable only for an abuse of discretion. Hempell v. United States, 392 F.2d 45, 48 (8th Cir. 1968). The trial court did not abuse its discretion in this case. Our statement in Wolford v. United States, 401 F.2d 331, 333 (10th Cir. 1968), is fully appli-

cable: "[I]t is not contemplated that the government shall prepare the defense in criminal cases. The procedures used were fully explored on cross-examination. The record discloses no prejudicial error in the court's denial to Wolford of the 'step-by-step' procedures used by the government chemists . . . ." Indeed, appellant was acquitted of Count IV of the indictment which charged possession of cocaine with intent to distribute.

V.

Jury Instructions

Appellant alleges that error was committed over his timely objection when the trial court, while instructing on intent, stated:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. *So, unless the contrary appears from the evidence,* the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by him.

The clause which the defendant finds objectionable is "*So, unless the contrary appears from the evidence . . . .*" The underlined portion is objected to on the basis that it has the effect of shifting the burden of proof.

This instruction has been much criticized and, in some instances, has been held to be clearly erroneous. For a critical analysis of this instruction with citation to cases, see Devitt & Blackmar, Federal Jury Practice and Instructions § 13.06 (1970). A number of courts, viewing this instruction in the context of all the given instructions, have determined that it is neither plain nor reversible error.

See, e.g., United States v. Releford, 352 F.2d 36, 40 (6th Cir. 1965), *cert. denied,* 382 U.S. 984 (1966); Estes v. United States, 335 F.2d 609, 615-17 (5th Cir. 1964), *cert. denied,* 379 U.S. 964 (1965); Sherwin v. United States, 320 F.2d 137, 148-51 (9th Cir. 1963), *cert. denied,* 375 U.S. 964 (1964). In United States v. Woodring, 464 F.2d 1248, 1251 (10th Cir. 1972), this court stated that an instruction practically identical to the one in question should not be given when a specific intent instruction is also given. We there held, however, that in the context presented the giving of it was not plain error.

In the setting which is before us, we do not consider the instruction prejudicial. It was not given in a manner which emphasized the objectionable clause. *See* Forster v. United States, 237 F.2d 617 (9th Cir. 1956). Rather, it was ringed around with charges that "[t]he burden of proof is upon the government to prove each of the essential elements of each of the offenses charged beyond a reasonable doubt"; "[t]he burden is always upon the prosecution to prove both act, or failure to act, and intent beyond a reasonable doubt"; "[i]n this case specific intent must be proven before there can be a conviction, and the Court has mentioned that as one of the essential elements that must be proven." The court very correctly defined specific intent, stating that "[a] person who knowingly does an act which the law forbids, intending with bad purpose, either to disobey or to disregard the law may be found to act with specific intent." The questioned instruction was then given in regards to proving intent by circumstantial evidence and thereafter the court again repeated the requirements of burden of proof and specific intent.

It is impossible to conceive a jury shifting the burden of proof or being misled as to the necessity for the government to prove specific intent beyond all reasonable doubt.

VI.

Defendant's Tendered Instructions

The remainder of defense counsel's very thorough argument is addressed to his tendered instructions. These number 155, however only six of these are the subject of specific objection.

A. It is contended that since the trial court mentioned in the presence of the jury that Merkowitz had entered a plea of guilty, it became necessary to caution the jury that they were not to consider this for any purpose. The remark of the court occurred during counsel's cross-examination of the witness Nocenti. Determining that the questions of appellant's counsel were far afield, the court stated that "the tenor of your questions is that this witness induced Mr. Merkowitz to become part of the conspiracy. So what? It is not material. He has plead guilty to being, as you know, and he is not on trial."

This colloquy, between the court and appellant's counsel, occurred after the subject of Merkowitz' plea had been introduced and pursued by appellant's counsel. He had previously asked of the witness Merkowitz: "Now you entered your plea in September of this year, isn't that right?" Moreover, during its instructions, the court stated that "[t]he argument, statements and objections made by counsel to the Court or to each other, and the rulings and orders made by the Court, and the remarks made by the Court during the trial, and not directed to you, should not be considered by you in arriving at your verdict." In view of this general cautionary instruction and considering the circumstances leading to the court's statement, we conclude that prejudicial error is not established.

B. Appellant's contention that the trial court erred in not instructing the jury that the acts of Nocenti were not the acts of a conspirator also lacks merit. When instruct-

ing on conspiracy, the trial court spoke of alleged members in the consiparcy. The court did not refer to Nocenti as a member and the indictment did not name him as a conspirator. Hence, we fail to see the necessity for instructing on this.

C. Emphasis is also placed on alleged error of the trial court in not giving his requested instruction on entrapment. But this defense was inconsistent with defendant's position that he was not a member of the conspiracy. *See* United States v. Gibson, 446 F.2d 719 (10th Cir. 1971); Munroe v. United States, 424 F.2d 243 (10th Cir. 1970). Moreover, the court did instruct as to appellant's theory that he believed that the packet he accepted from Nocenti contained money rather than cocaine.

D. We have considered appellant's contentions that the trial court erred in refusing its instructions regarding proof of an overt act and the identity of the alleged cocaine. It is sufficient to state that the court's instructions properly covered the law on those issues and it was under no duty to substitute appellant's instructions for its own. Furthermore, appellant was acquitted on Counts II and IV, thus indicating a lack of prejudice with respect to the identity of the alleged cocaine.

The court's charge was adequate. The judgment of the district court is affirmed.

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

No. 73-1081

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

EUGENE L. SMALDONE aka "Young Gene," "Flipper" and "Gene", *Defendant-Appellant,*

JULY TERM — AUGUST 31, 1973

These matters come on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Phillips, Hill and Doyle, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

LIBRARY
SUPREME COURT, U. S.

No. 73-710

FILED
JAN 24 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

EUGENE L. SMALDONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
PETER KRAUSER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 484 F. 2d 311.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1973. A timely petition for rehearing was denied August 31, 1973 (Pet. App. 19a). On September 24, 1973, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October 30, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge erred in excluding a question by defense counsel on cross-examination which, in the circumstances of this case, could reasonably

have been understood by the witness as implying the threat of retaliation.

2. Whether notes taken by a United States Attorney at an interview with a prosecution witness during preparation for trial constitute a "statement" as defined by 18 U.S.C. 3500(e).

3. Whether the district court appropriately instructed the jury with respect to the burden of proof.

4. Whether the district court properly denied petitioner's requests for discovery of detailed laboratory findings and memoranda of chemical tests.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

The Jencks Act, as amended, 18 U.S.C. 3500, provides in pertinent part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *
>
> * * * * *
>
> (e) The term "statement" * * * means—
>
> (1) a written statement made by said witness

> and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; * * *.

Rule 16(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government * * *.

STATEMENT

Petitioner and Larry Merkowitz arranged for Craig Mundt, Ronald Greenspan, and Ronald Nocenti to purchase cocaine in Peru and deliver it to them in the United States (Tr. 125-126, 127-130, 132, 135-136).[1] With the assistance of Nocenti, who was a paid government informer, federal agents arrested both petitioner and Merkowitz as they took delivery of the cocaine (Tr. 140-142, 271, 279-283, 535).[2] Merkowitz pled guilty to one count of conspiracy to import cocaine, and he testified as a prosecution witness at petitioner's trial.

---

[1] "Tr." refers to the transcript of trial proceedings (which begins with Volume II of the reporter's transcript).

[2] Mundt and Greenspan were arrested by Peruvian police in Peru (Pet. 5).

Petitioner was tried before a jury in the United States District Court for the District of Colorado and convicted on one count of conspiracy to import cocaine, in violation of 21 U.S.C. 963.[3] He was sentenced to ten years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-18a).

ARGUMENT

1. During the cross-examination of Nocenti at trial, defense counsel asked him for his present address. The trial judge had previously been informed that Nocenti had been relocated for his own protection, and defense counsel similarly had been notified that "substantial reason to fear for [Nocenti's] safety has been shown and he has requested that his present whereabouts not be divulged" (Pet. App. 11a).[4] The only reason given by defense counsel at trial for wanting Nocenti's address was "[t]o place the witness in the context of his environment" (Pet. 7). The trial judge sustained the government's objection to defense counsel's question.

Petitioner contends (Pet. 14-20) that the trial court's ruling conflicts with this Court's decisions in *Alford* v. *United States*, 282 U.S. 687, and *Smith*

---

[3] Petitioner was acquitted on counts charging him with aiding and abetting the importation of cocaine, in violation of 21 U.S.C. 952(a), and of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

[4] Nocenti's fears for his personal safety presumably were connected with petitioner's unsavory reputation; this reputation was acknowledged by petitioner in a separate federal prosecution, in which he requested a change of venue on the ground that "the name Smaldone is so closely associated with crime and violence in the Colorado area that any possiblity of a fair trial was nonexistent." *United States* v. *Smaldone*, 485 F. 2d 1333, 1345 (C.A. 10).

v. *Illinois,* 390 U.S. 129. This Court in those cases went no further than to hold that a question concerning a witness' address is within the accused's constitutional right of cross-examination so long as the question does not tend merely to harass, annoy, or humiliate the witness. But when the question can reasonably be understood as implying a threat of personal injury to the witness, it is outside the bounds of constitutionally protected cross-examination. See *Smith* v. *Illinois, supra,* 390 U.S. at 133-134 (concurring opinion of Mr. Justice White); *United States* v. *Alston,* 460 F. 2d 48, 52 (C.A. 5); *United States* v. *Daddano,* 432 F. 2d 1119, 1128 (C.A. 7), certiorari denied, 402 U.S. 905; *United States* v. *Persico,* 425 F. 2d 1375, 1384 (C.A. 2), certiorari denied, 400 U.S. 869. The implied threat of retaliation against a witness is of course a serious form of harassment.[5]

Moreover, the values furthered by the Sixth Amendment would not have been advanced by requiring Nocenti to answer the question in the circumstances of this case. Nocenti was subjected to an extensive cross-examination (Tr. 290-368) covering his occupation, background, present circumstances, and activities and remuneration as a paid government informer. There was no further need

---

[5] Petitioner alternatively contends (Pet. 17-20) that, even if the question impermissibly harassed Nocenti, the trial judge erred in prohibiting it without making an explicit finding of harassment. But restriction of the scope of cross-examination is within the sound discretion of the trial judge, and his rulings with respect to such matters may be overturned only upon a showing of an abuse of discretion. See, *e.g., Alford* v. *United States, supra.* In short, the trial court need not spell out the grounds for its findings with respect to the scope of cross-examination, and such rulings must be sustained if supported by any valid ground. See *United States* v. *Alston, supra.*

to place him "in the context of his environment." See *United States* v. *Saletko,* 452 F. 2d 193 (C.A. 7), certiorari denied, 405 U.S. 1040. Thus, petitioner has failed to show that, in the factual circumstances here, the exclusion of the question pertaining to Nocenti's address affected his "substantial rights." Rule 52(a), Fed. R. Crim. P.

2. With respect to petitioner's contention (Pet. 20-22) that he was entitled to production of the United States Attorney's interview notes made in preparation for trial, we rely primarily on the opinion of the court of appeals (Pet. App. 5a-9a). Petitioner claims that the decision below conflicts with *Saunders* v. *United States,* 316 F. 2d 346 (C.A. D.C.), which he characterizes as holding that such interview notes constitute "substantially verbatim recitals" subject to production under the Jencks Act. That was not the holding of *Saunders;* the court there only remanded for a hearing to determine whether such notes contained any producible material. That holding was implicitly disapproved in the subsequent decision in *United States* v. *Augenblick,* 393 U.S. 348, where on similar facts this Court did not remand but instead relied upon the "good sense and experience" (393 U.S. at 355) of the trial court. Thus there would appear to be no present conflict between the courts of appeals on this question.

3. Petitioner also contends (Pet. 22-24) that the trial court's instructions to the jury on the issue of specific intent improperly shifted the burden of proof away from the government. But, as the court of appeals noted, the trial court's repeated instructions with respect to the government's burden of proof were so clear, explicit, and emphatic that "[i]t is impossible to conceive [that the jury was] misled as to the neces-

sity for the government to prove specific intent beyond all reasonable doubt" (Pet. App. 16a). Moreover,contrary to petitioner's contention, there is no conflict among the courts of appeals as to the validity of the specific-intent instruction read to the jury in this case. In the cases petitioner cites (Pet. 23), the courts merely reviewed the jury instructions as a whole and determined that the specific-intent instruction also given here had not, in those prosecutions, been sufficiently clarified by accompanying instructions with respect to the burden of proof. Thus the differences in results among the courts of appeals reflect differences in the context in which the specific-intent instruction was given, not a disagreement about the validity *per se* of that instruction.

4. Petitioner further contends (Pet. 24-26) that the trial court erred in refusing to order pretrial disclosure under Rule 16(a)(2), Fed. R. Crim. P., of detailed laboratory findings and memoranda of chemical tests prepared by the chemists who identified the substance delivered to petitioner by Nocenti as cocaine. Discovery orders under Rule 16(a)(2) are within the discretion of the district court, and there was no abuse of discretion here. Petitioner had been supplied with summaries of the laboratory findings prior to trial (Pet. 13), the more detailed findings and memoranda were made available to him at trial (Tr. 435-439), the substance identified as cocaine was itself made available to the defense for its own analysis (Tr. 439), and defense counsel extensively cross-examined the chemist who had analyzed the substance for the government (Tr. 408-505). Petitioner therefore had ample opportunity at trial to contest the accuracy of the chemical findings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
PETER KRAUSER,
Attorneys.

JANUARY 1974.

DOJ-1974-01

LIBRARY
SUPREME COURT, U. S.

Supreme Court
FILED
FEB 8
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

ALAN Y. COLE
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Of Counsel:

JAMES M. SHELLOW
222 East Mason Street
Milwaukee, Wisconsin 53202

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-710

EUGENE L. SMALDONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

The Brief for the United States in Opposition was filed well after the expiration of an extension of time granted by the Clerk.[1] While such an untimely filing

---

[1] The Petition was filed on October 30, 1973, and was received by the Government on October 31, 1973. The Government's response was thus due on December 20, 1973. On timely application, the Clerk on December 14, 1973, granted the Solicitor General's request for an extension of time within which to file a response to and including January 4, 1974.

The Government's Brief in Opposition was in fact filed on January 24, 1974, without any request for additional time beyond January 4 and without benefit of any motion for leave to file an untimely response.

is not a jurisdictional defect, the Court may wish to consider some form of sanction against the Government. The late filing is not unique to this case nor an isolated instance of the Government's dilatoriness. Repeated late filings by the Solicitor General, particularly in criminal cases, cause both (a) a delay in this Court's consideration of such cases, and (b) an unnecessary delay in the rendition of ultimate appellate justice for those convicted of federal offenses. This latter consideration is especially pertinent here since Petitioner has been (and is now) in custody throughout the appellate process.

In any event, the Government's late response in this case contains several misconceptions about the questions presented in the Petition and the reasons why these questions deserve review by this Court. To remove these misconceptions, this short reply is necessary.

I

The Government's opposition serves only to add to the confusion surrounding the efforts of various Circuits to apply Mr. Justice White's suggestion in his concurrence in *Smith* v. *Illinois,* 390 U.S. 129, 133-34, (1968). That suggestion, as yet not approved by this Court, is that a defendant's constitutional right to inquire as to the present address of a principal Government witness disappears upon a showing by the Government or the witness that his personal safety might be endangered if his whereabouts are revealed.

(a) The Government's brief (Op. Br. 4-6), like the opinion below, totally ignores Mr. Justice White's predicate that the burden is on the Government or the witness "at the very least [to] come forward with some

showing of why the witness must be excused from answering the question." Only after such a showing has been made, said Mr. Justice White, can the trial judge "then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling."

Yet the Government would seemingly have the burden shifted to the defendant to show that, in the particular factual circumstances, denying him the right to inquire as to the witness' address would somehow affect his "substantial rights." (Op. Br. 6).[2] By thus removing from the prosecution or the witness the burden of showing the potential of harm, the Government would render it difficult if not impossible for the trial judge to exercise a truly "informed discretion" in evaluating an objection to such an inquiry. Indeed, the Government goes so far as to suggest (Op. Br. 5, fn. 5) that the trial judge, unaided by any claim or showing of potential harm to the witness, "need not spell out the grounds" for restricting the scope of cross-examination; it is said to be enough if his ruling can somehow be "supported by any valid ground."

(b) The ultimate confusion instilled by the Government's position is to be found in its search for evidence

---

[2] The Government argues (Op. Br. 5) that in this case the defense subjected the prosecution witness Nocenti to "an extensive cross-examination" respecting his occupation and background as a paid informer. Hence, the argument continues, there was no "further need" to place Nocenti in the context of his environment by asking his present address. But precisely that argument was advanced by the Government and rejected by this Court in *Alford* v. *United States*, 282 U.S. 687, 691 (1931). There are values involved in permitting an inquiry as to the witness' address that have no counterpart in other forms of cross-examination. See *Smith* v. *Illinois*, 390 U.S. at 131.

outside the trial record for "any valid ground" that can be said to lend support to the trial judge's otherwise unsupportable refusal to permit the inquiry as to the witness' address. Not content with the three items outside the record relied upon by the Tenth Circuit (see Petition, p. 18), the Government now adds (Op. Br. 4, fn. 4) the bizarre notion that the witness' fear for his personal safety was "presumably . . . connected with petitioner's unsavory reputation" as allegedly acknowledged by Petitioner in a change of venue motion filed in another unrelated federal prosecution. The basic question thus raised is whether a defendant may be denied his constitutional right to inquire as to the address of a witness without any claim or proof of potential danger having been made before the trial judge and without affording the defendant the opportunity to refute the out-of-court considerations that an appellate court later thinks sufficient to sustain the trial judge's summary ruling.[3]

II

With respect to Petitioner's contention that he was entitled under the Jencks Act to the production of the United States Attorney's interview notes made prior to trial, the Government suggests only (Op. Br. 6) that the conflicting ruling of the District of Columbia Circuit in *Saunders* v. *United States,* 316 F.2d 346, merely remanded for a hearing to determine if such

[3] Despite the confusion that marks the opinion below, that opinion has already been cited by the Seventh Circuit in support of the statement that "There are occasions, of course, when compelling reasons, such as concern for the safety of a witness, may justify curtailing even this preliminary inquiry." *United States* v. *Ott,* No. 73-1251, 7th Cir., Dec. 5, 1973, slip opinion p. 7 at fn. 11.

notes contained any producible material. If that indeed be the purport of the *Saunders* ruling, the conflict with the decision below remains viable. The refusal of the Tenth Circuit to remand the instant case for such a hearing cannot be squared with the order in *Saunders.*

Moreover, nothing in this Court's decision in *Augenblick,* 393 U.S. 348, bears out the Government's claim (Op. Br. 6) that *Saunders* was there "implicitly disapproved." This Court in *Augenblick* simply found the record there to be too imprecise to warrant a ruling as to when prosecutor's notes are producible under the Jencks Act. That is the problem that is here presented inescapably on a precise record. It deserves resolution now by this Court.

III

The Government asserts (Op. Br. 7) that the conflicts among the Circuits as to the instruction to the jury on the issue of specific intent (see Petition, pp. 22-24) "reflect differences in the context in which the specific-intent instruction was given, not a disagreement about the validity *per se* of that instruction."

It is sufficient to note that the Fifth Circuit in *Mann* v. *United States,* 319 F.2d 404, 410, held that this instruction was in effect invalid *per se* and that

> "Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one."

Thus the conflict on the issue of the specific intent instruction is of the direct and irreconcilable variety that justifies the grant of certiorari.

CONCLUSION

The other contentions advanced in the Government's opposition brief need no reply at this juncture. Suffice it to say, however, that the considerations advanced by the Petitioner in this reply brief, supplementing those set forth in the Petition, fully justify the grant of certiorari to review the judgment and opinion below.

Respectfully submitted,

ALAN Y. COLE
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Of Counsel:

JAMES M. SHELLOW
222 East Mason Street
Milwaukee, Wisconsin 53202